IN THE DISTRICT COURT OF APPEAL OF THE STATE OF FLORIDA
FIFTH DISTRICT

NOT FINAL UNTIL TIME EXPIRES TO FILE MOTION FOR REHEARING AND DISPOSITION THEREOF IF FILED

STATE FARM MUTUAL AUTOMOBILE INSURANCE COMPANY,

Appellant/Cross-Appellee,

v.

Case No. 5D20-1595
5D20-1601
LT Case No. 2018-CA-00631

CHRISTEL DAVIS, INDIVIDUALLY AND AS PARENT AND GUARDIAN OF C.H., A CHILD,

Appellee/Cross-Appellant.

_____/

Opinion filed March 25, 2022

Appeal from the Circuit Court for Citrus County,
Carol A. Falvey, Judge.

Jennifer J. Kennedy and Jeffrey M. Adams, of Abbey, Adams, Byelick & Mueller, LLP, St. Petersburg, for Appellant/Cross-Appellee.

John N. Bogdanoff, of The Carlyle Appellate Law Firm, Orlando, for Appellee/Cross-Appellant.

EDWARDS, J.

Appellant, State Farm Mutual Automobile Insurance Company ("State Farm"), appeals the trial court's several orders that permitted Appellee, Christel Davis ("Davis"), to argue and present for the jury's decision the element of personal injury damages for aggravation of preexisting injuries or conditions. State Farm repeatedly objected below and on appeal asserts that the trial court erred in permitting that issue to be tried, given that Davis failed to plead that claim of special damages in her complaint.[1] Additionally, State Farm argues that its motion for directed verdict regarding aggravation damages should have been granted because Davis failed to present any evidence to support that claim. We agree with both of State Farm's arguments, quash the subject orders, reverse the final judgment, and remand for entry of an order granting State Farm's motion for directed verdict and for a new trial on the issues of causation and monetary amount, if any, for future medical expenses and future non-economic damages but excluding recovery for any aggravation of preexisting conditions.

[1] Under the circumstances presented here, including State Farm's early requests and repeated objections seeking to exclude aggravation damages from all aspects of the trial and Davis' anticipatory objection to any continuance of trial, we agree with the Third District that it was not necessary for the defendant, who was ready for trial on the issues pled, to ask for a continuance in order to preserve the issue for appellate review. *See MGH Enters. Inc. v. Nunnally*, 536 So. 2d 317, 319 (Fla. 3d DCA 1988).

Davis' Claims

On October 15, 2016, Davis was involved in a collision between her car and another vehicle. She claimed that the wreck and her injuries were caused by the negligence of an uninsured/underinsured motorist ("UM"). State Farm was Davis' auto insurer and the policy issued to Davis provided UM coverage for this incident and her related claims.

Pleadings

Davis filed suit against both the negligent driver and State Farm "for the total amount of loss, injury, and damages caused by" the negligent driver and for recovery of "damages" from State Farm pursuant to her UM policy.[2] In her complaint and amended complaint, Davis claimed that as a result of the collision, she sustained personal injury, had "suffered loss, injury and damages," alleged that her "injuries are permanent, and losses and damages are continuing," and she "will suffer losses and damages into the future." In its answer, State Farm admitted that the uninsured driver was negligent and the sole cause of the crash. Thus, State Farm only contested the causation, nature, extent, and consequences of Davis' injuries or medical conditions.

Medical Evidence

[2] It does not appear that the negligent driver participated in the trial.

Discovery and trial testimony revealed that beginning in 2002, Davis sought chiropractic care and treatment from Dr. Oliverio for pain, restricted movement, and related conditions in her low back and neck. From 2008 until the crash in 2016, Davis went to Dr. Oliverio forty-three times for treatment of her cervical spine, thoracic spine, lumbar spine, and sacrum. Three days after the subject 2016 crash, Davis went to Dr. Oliverio complaining of pain in her neck, ribs, middle back, shoulders, hip, lumbar spine, and headaches. Dr. Oliverio testified that the injuries and related symptoms that Davis sustained in the 2016 crash were not the same as those for which he had been treating her during the fourteen years prior to the crash.

Dr. Oliverio referred Davis to a medical doctor, Dr. Marsh, who provided steroid and nerve block injections to deal with her headaches, muscle spasms, and tenderness in her neck and low back. Dr. Marsh then referred Davis to Dr. Sullivan, an orthopedic surgeon, who diagnosed Davis as having two herniated discs, which he testified were caused by the wreck. Dr. Sullivan further opined that Davis suffered pain from her sacroiliac joints and her neck, also caused by the wreck. Dr. Sullivan recommended surgery as the required future treatment for each of the abovementioned conditions.

State Farm retained Dr. Martinez to perform a compulsory medical examination of Davis. After performing his examination and reviewing her

medical records, Dr. Martinez reached the conclusion and testified that her neck and back pain and her headaches were unrelated to the crash.

There was absolutely no medical testimony or any other evidence presented by either side that the subject wreck had aggravated any of Davis' preexisting injuries or conditions.[3]

Aggravation of Preexisting Condition Issue

Davis did not include any claim for special damages for aggravation of preexisting injuries or conditions in her complaint even though her counsel acknowledged such claims were "standard pleadings."[4] In her pretrial statement Davis simply claimed that "as a result of this crash," she "suffered significant and permanent loss, injury and damages"; she did not make any mention of or claim regarding aggravation of preexisting conditions.

[3] In his special concurring opinion, our colleague points out the obvious: that Davis had preexisting medical conditions and was involved in a collision. However, he does not and cannot point to any testimony or other evidence that the wreck aggravated any of Davis' preexisting conditions. Those are two distinctly different concepts as should become clear in the discussion below. Aggravation of preexisting conditions must be proved; it is not presumed.

[4] The Florida Rules of Civil Procedure include form complaints that are frequently used for common cases. One such suggested complaint that is often used for typical personal injury car wreck cases is Form 1.945 "Motor Vehicle Negligence Complaint." That form complaint includes a specific claim for "aggravation of a previously existing condition," which claim is conspicuously absent from Davis' complaint and pretrial statement.

Nevertheless, shortly before trial, Davis presented her proposed verdict form which contained Question 4: “What is the total amount of Christel Davis’s damages for pain, suffering, disability, physical impairment, disfigurement, mental anguish, inconvenience, *aggravation of a disease or physical defect* and loss of capacity for the enjoyment of life.” (emphasis added).

While it is not clear from the record, it would appear that receipt of Davis’ proposed verdict form caused State Farm justifiable concern that Davis would try to seek recovery for aggravation of a preexisting condition. Just before trial started, State Farm brought the matter to the trial court’s attention by advising that Davis’ complaint did not allege or seek aggravation damages and State Farm did not want Davis to try to interject that issue into the trial. State Farm specifically stated that it wanted to make sure that claim

was not included in the verdict form that would be provided to the jury.[5] Davis responded that State Farm had engaged in discovery regarding her previous injuries and medical treatment which led her to anticipate that "the defense is going to be that our client had prior back and neck . . . treatment."

After hearing argument from both sides, the trial court stated that because State Farm was aware of Davis' prior injuries and treatment, a claim for aggravation of preexisting conditions would be permitted. Thus, the trial court denied State Farm's request to exclude any mention of aggravation of preexisting conditions or injuries.[6] When Davis asked the venire during voir

[5] In his specially concurring opinion, our colleague suggests that State Farm was sandbagging Davis by not filing a motion in limine in advance of trial. We disagree. First, a motion in limine seeks to exclude specific evidence rather than, as here, to prohibit the late introduction of a new claim for special damages. Second, neither the title nor content of such a motion readily suggests itself when one party seeks to have the trial limited to the issues actually pled. As it was, the trial court's pretrial order requiring all motions in limine to be filed at least forty-five days in advance of trial certainly precipitated a great deal of motion sickness, given that Davis filed a nine-page motion in limine addressing forty specific topics, while State Farm filed seven separate motions in limine totaling seventeen pages. Although some of the topics may have been specific to this case, most of the topics addressed in both parties' motions in limine set forth well-settled rules of law governing permissible conduct and impermissible comments, the breach of which could result in a mistrial, and which did not require the trial court's pretrial rulings in order for counsel to know how to properly proceed.

[6] State Farm's argument that permitting introduction of aggravation damages meant the case would no longer be at issue, and thus not ready for trial, was rejected by the trial court.

dire whether they thought somebody should be allowed to recover for aggravation of preexisting injuries, State Farm objected, and its objection was overruled. Repeatedly during trial, State Farm objected whenever Davis tried to interject that unpled claim into trial, and the objections were consistently overruled.

At the close of Davis' case, State Farm moved, unsuccessfully, for entry of a directed verdict because no evidence was presented by any witness that the subject collision aggravated any of Davis' preexisting conditions. Likewise, State Farm's objections to instructing the jury on aggravation damages and to inclusion of aggravation damages on the verdict form were overruled.

The jury returned a verdict which awarded Davis zero dollars for past lost wages, zero dollars for future loss of earning capacity, and zero dollars for past non-economic damages. The jury's verdict, which State Farm contests, awarded Davis $350,000 for future medical expenses and $150,000 for all future non-economic damages including for aggravation of preexisting conditions. State Farm's motion for new trial, which was denied, asserted inter alia that the trial court erred by permitting the claim of aggravation damages to be presented to the jury. State Farm timely appealed.

Analysis

Pleadings Define the Issues to Be Tried

We now consider the first argument made by State Farm: the trial court erred in permitting the trial of an unpled claim for damages caused by aggravation of preexisting conditions. Essentially, at the encouragement of Davis, the trial court disregarded the claims actually pled and focused instead on what claims and defenses the evidence disclosed in discovery might support. As discussed below, the trial court erred in that regard.

The important role of pleadings was long ago confirmed. "[I]ssues in a cause are made solely by the pleadings . . . ." *Hart Props. Inc. v. Slack*, 159 So. 2d 236, 239 (Fla. 1963). "'Pleadings are the allegations made by the parties to a suit for the purpose of presenting the issue to be tried and determined. They are the formal statements by the parties of the operative, as distinguished from the evidential, facts on which their claim or defense is based.'" *Id.* (quoting 25 Fla. Jur., Pleadings, § 2). "The purpose of pleadings is to present, define, and narrow the issues, and to form the foundation of, and to limit, the proof to be submitted on the trial." *White v. Fletcher*, 90 So. 2d 129, 131 (Fla. 1956) (quoting 71 C.J.S., Pleading, §1).

> The objective sought in the present rules is to reach issues of law and fact in one affirmative and one defensive pleading.

> This purpose will not be served nor this objective achieved if operational issues, as distinguished from evidential issues, are allowed to be created outside the pleadings in depositions, admissions, affidavits, and the like, which may be filed in a cause. If this were allowed neither the parties nor the court would be able to say with certainty what the triable issues in a cause are.

Hart Props., 159 So. 2d at 239 (internal citation omitted).

Lest someone suggest that the rule limiting trial to the claims and defenses actually pled is as outdated as relying on books for case law, it remains the law. "Litigants in civil controversies must state their legal positions within a particular document, a pleading, so that the parties and the court are absolutely clear what the issues to be adjudicated are." *Bank of Am., N.A. v. Asbury*, 165 So. 3d 808, 809 (Fla. 2d DCA 2015); *see also Varnedore v. Copeland*, 210 So. 3d 741, 745 (Fla. 5th DCA 2017) (quoting *Asbury*, 165 So. 3d at 809). "[P]leadings function as a safeguard of due process by ensuring that the parties will have prior, meaningful notice of the claims, defenses, rights, and obligations that will be at issue when they come before a court." *Abdo v. Abdo*, 313 So. 3d 802, 804 (Fla. 2d DCA 2021) (internal citations omitted).

Pleading Special Damages

When special damages are sought, the pleading requirements become more demanding. "Special damages are those that do not *necessarily* result

from the wrong or breach of contract complained of, or which the law does not imply as a result of that injury, even though they might naturally and proximately result from the injury." *Land Title of Cent. Fla., LLC v. Jimenez,* 946 So. 2d 90, 93 (Fla. 5th DCA 2006) (emphasis in original). Florida Rule of Civil Procedure 1.120(g) mandates that "[w]hen items of special damages are claimed, they shall be specifically stated." "If special damages are not specially plead [sic], then evidence of them is inadmissible." *Bialkowicz v. Pan Am. Condo. No. 3, Inc.*, 215 So. 2d 767, 770 (Fla. 3d DCA 1968). A trial court errs when it denies an objection or motion that seeks to limit the evidence and trial to those claims and damages actually pled. *Precision Tune Auto Care, Inc. v. Radcliffe*, 804 So. 2d 1287, 1292 (Fla. 4th DCA 2002) (citing *Bialkowicz*, 215 So. 2d at 770).

People injured in automobile accidents may or may not have preexisting conditions. If they have some preexisting condition, it may or may not be aggravated by the collision, even if the same general part of the body is involved. Thus, because aggravation of preexisting conditions "do[es] not *necessarily* result from the wrong . . . even though they might naturally and proximately result from the injury," it is a claim for special damages which must be specifically pled. *Jimenez*, 946 So. 2d at 93 (emphasis in original).

"Nor is the mere knowledge by the defense of the claimed damages sufficient to excuse the pleading requirement." *Id*. If the point regarding the absolute requirement to plead special damages was too subtle, it was repeatedly made in *Jimenez*. "If special damages are claimed, they must be 'specifically stated' in the appropriate pleading." *Id*. at 92. "Special damages must, therefore, be particularly specified in a complaint in order to apprise the opposing party of the nature of the special damages claimed. If special damages are not specifically pled, then evidence of them is inadmissible." *Id*. at 93. "More importantly for purposes of the present case, damages may not be awarded on a claim that is not contained within the pleadings." *Id*.; *see JP Morgan Chase Bank Nat'l Ass'n v. Colletti Invs., LLC,* 199 So. 3d 395 (Fla. 4th DCA 2016) (holding that defendant's admitted knowledge from discovery and pleadings that plaintiff sought special damages in some but not all counts, cannot overcome plaintiff's failure to adequately plead special damages in only count of complaint on which plaintiff prevailed).

As with most rules, there is an exception, here a single exception, to limiting a trial to the issues actually pled. "Under existing rules the *only* instance in which legal issues not raised in the pleadings may be tried and decided is where the issue, although not pled, is tried by consent of the parties." *Hart Props.*, 159 So. 2d at 239 (emphasis added). That single

exception is currently embodied in Florida Rule of Civil Procedure 1.190(b): "When issues not raised by the pleadings are tried by express or implied consent of the parties, they shall be treated in all respects as if they had been raised in the pleadings."[7] Given State Farm's initial requests and repeated objections aimed at excluding aggravation of preexisting conditions from the trial, any suggestion that the issue was tried by consent is unsupported. However, that is what Davis implicitly claimed during trial when moving to amend her pleadings to conform to the evidence, which motion the trial court correctly denied.[8]

"[A] claim for special damages such as the aggravation of a preexisting condition must be pled and it is per se reversible error for a trial court to permit evidence of such damages absent a pleading claiming such." *Carnival Cruise Lines v. Nunez*, 646 So. 2d 831, 833 (Fla. 3d DCA 1994). "It

[7] Thus, the suggestion by our colleague's special concurring opinion that State Farm's knowledge of Davis' preexisting conditions and her involvement in an auto accident constituted an additional exception to the rule requiring special damages to be pled in the complaint is unsupported and directly contrary to the holding and repeated statements of the rule in this Court's *Jimenez* case. "Lack of surprise will not authorize the admission of evidence of special damages that have not been specifically pleaded." *Jimenez*, 946 So. 2d at 93.

[8] *See Gardner v. Terminal Transp. Co.*, 189 So. 2d 405, 406–07 (Fla. 2d DCA 1966) (unpled claim for aggravation of preexisting thyroid condition was tried by consent when related evidence was admitted without objection).

has been held that it is automatic reversible error for the trial court to permit evidence of special damages without a pleading claiming such." *MGH Enters., Inc.*, 536 So. 2d at 318.

Accordingly, as to State Farm's first argument, we hold that the trial court erred in permitting the unpled claim for aggravation damages to become any part of the trial. We reverse and remand for a new trial limited to the cause and amount of future medical expenses, if any, and the cause and amount of future non-economic damages, if any, which shall not, for reasons explained below, include any damages for aggravation of preexisting conditions or injuries.

Failure to Direct Verdict on Aggravation Damages

State Farm's second argument is that the trial court erred in denying its motion for directed verdict based on the lack of any evidence that the subject collision aggravated any preexisting conditions that Davis may have had. As noted above, Davis' medical witnesses all testified that the subject wreck was the sole cause of her injuries and related complaints. Contrarily, State Farm's medical expert testified that all of Davis' complaints were simply the progressive effects of her prior medical conditions which were unrelated to the collision. Absolutely no evidence was presented by either side to the effect that the collision aggravated any prior condition, disease, or injury.

As the cases discussed below demonstrate, under those circumstances, it was error to instruct the jury on aggravation of preexisting conditions and to include aggravation damages in the verdict form. The following cases found it was or would have been error to permit the jury to consider aggravation damages when no evidence was presented on aggravation of preexisting conditions. Although less clear, it would additionally appear that in some of them, either aggravation damages were not pled or if pled, that theory was not properly pursued at trial.

Llompart v. Lavecchia involved a man who, before his car wreck, "was a wage-earning, functional human being but that, by his bizarre behavior, he showed an abnormal mental adjustment to life." 374 So. 2d 77, 78 (Fla. 3d DCA 1979). Following the multi-car collision, Llompart quit speaking, bathing and shaving; he became very nervous, quit working, became totally withdrawn, and adopted infantile behavior such as clinging to his wife who had to physically feed him. *Id.* at 78–79. The Third District observed that the plaintiffs' complaint asserted a direct causal relationship from the accident that led to Llompart's current condition. *Id*. at 80.

> The element of a pre-existing injury was introduced by the defendants, in rebuttal to plaintiffs' contention that Llompart's condition was caused by the accident, when they showed a continuing course of conduct over many years from which the jury could reasonably conclude that Llompart's condition

> immediately prior to trial was a natural result of the development of a disease which was engendered or began many years ago.

Id.

The closest any testimony came to "aggravation" was when one of the plaintiffs' psychiatrists testified that the accident "triggered" the change in Llompart's behavior; yet he denied any prior injury. *Id.* at 79. Plaintiffs' second psychiatrist testified that his post-accident behavior was directly caused by the accident. *Id*. The defendants' psychiatrist testified that there was no connection between the auto accident and his post-accident behavior as Llompart sustained no organic brain injury and the injuries he did sustain would not have produced the behavioral changes complained of. *Id*. The Third District upheld the trial court's denial of the plaintiffs' request for the jury to be instructed on aggravation of preexisting condition or disease. The court acknowledged the rule that parties are entitled to have the jury instructed on their theory of the case but pointed out an important restriction. *Id*. at 80. "This rule is further qualified by the fact that the issues upon which instructions are required are those formulated by the pleadings and presented by the evidence." *Id*. The Third District concluded that refusing to give an aggravation instruction allowed the jury to "proceed[] upon the theory of the case framed by the complaint and the evidence presented at the trial." *Id*.

In a legally similar case, *Benjamin v. Diel*, the Fourth District upheld the trial court's refusal to give an aggravation of preexisting condition instruction, where plaintiff argued his knee injury was solely caused by the subject accident. 831 So. 2d 1227, 1229 (Fla. 4th DCA 2002). The defense countered with their own medical expert who testified that plaintiff's knee injuries were entirely preexisting and not caused at all by the accident. *Id*. No evidence was presented by either side that the collision aggravated plaintiff's knee condition for which he had previously received extensive medical care and for which surgery had been recommended five years prior to this wreck. *Id.* at 1228–29.

Another case in which plaintiff had a preexisting medical condition but apparently failed to plead and certainly failed to prove aggravation of that condition by the subject collision is *Sanchez v. Martin*, 248 So. 3d 1174 (Fla. 4th DCA 2018). Plaintiff was a passenger in a bus that collided with a car driven by defendant. *Id*. at 1175.

> At trial, Plaintiff's only theory of liability was that [Defendant's] negligence caused the accident and that the impact of the accident caused the three-level disc herniation in his lower back. Although Defendants admitted negligence, they disputed both causation and damages. Specifically, Defendants argued that the accident did not cause any of the alleged injuries and that Plaintiff's subjective complaints of pain, stiffness, and spasms were related to his various preexisting degenerative conditions.

Id.

Plaintiff's medical expert testified that plaintiff's injuries were caused by the accident; he did not offer any testimony that any preexisting condition had been aggravated by the bus accident. *Id*. One of the medical experts testifying for the defendants testified that if the accident caused any injury, for which there was no objective evidence, it would have been in the nature of a temporary sprain or strain. *Id.* at 1176. The defendants' other medical expert testified that the source of plaintiff's complaints was demonstrated in an MRI that showed that he had long-term back problems, "conditions which take years to develop, and which could not have been caused by the accident." *Id*. at 1176. The second defense doctor answered affirmatively when he was asked on cross-examination by plaintiff, "whether trauma from an automobile accident could either aggravate or cause a spine problem[.]" *Id*. However, he was never asked whether the subject accident aggravated or activated any preexisting condition in plaintiff. *Id*.

At plaintiff's request and over defense objections based on lack of evidence, the trial court instructed the jury on aggravation of preexisting conditions, and the jury returned a $1.5 million verdict for plaintiff. *Id.* at 1176–77. The Fourth District reversed, finding that it was error to give that instruction in the absence of proof that plaintiff's preexisting back condition was aggravated by the bus accident. *Id*. at 1177. In reaching its decision,

the court discussed and relied upon *Carmona v. Carrion*, 779 So. 2d 337 (Fla. 2d DCA 2000), another case in which the plaintiff had a preexisting injury or condition, but no evidence was presented that the plaintiff's current injuries and complaints were related to the prior work-related injury. In *Carmona*, the Second District reversed the trial court's instructing the jury on aggravation damages. 779 So. 2d at 339.

Accordingly, it was error for the trial court in the case now before this Court to permit the claim for damages regarding aggravation of preexisting conditions or injury to reach the jury given the complete absence of any evidence suggesting that causal relationship. We reject as meritless Davis' claim that the error was harmless. The element of aggravation of preexisting conditions was contained within Question 4 on the verdict form along with other elements of non-economic future damages, and thus inextricably entwined with those damages which were properly considered. Davis did not prove "that there is no reasonable possibility that the error contributed to the [verdict]." *See Special v. W. Boca Med. Ctr.*, 160 So. 3d 1251, 1256 (Fla. 2014). Thus, a limited new trial will be required on the issues of causation and amount, if any, for future medical expenses and causation and amount,

if any, for future non-economic damages.[9] Given that State Farm's motion for directed verdict on the issue of aggravation damages was well taken, we direct the trial court to grant that motion on remand, thereby eliminating that claim from the new trial which we direct to be held.

Cross-Appeal

Davis cross-appealed, asserting, inter alia, that the trial court erred in denying recovery of attorney's fees based on its determination that her individual proposal for settlement was ambiguous. Given that the verdict for Davis only awarded future damages, which have now been set aside and must be retried, she is not entitled at this point to recover attorney's fees or taxable costs. Thus, the matter is not properly before us.

As to all other matters raised in the appeal and cross-appeal, we affirm.

AFFIRMED, in part; REVERSED, in part; and REMANDED, with instructions.

LAMBERT, C.J., concurs.
COHEN, J., concurring specially, with opinion.

[9] As noted previously, the jury's verdict awarded Davis zero dollars for past lost earnings, zero dollars for future loss of earning capacity, and zero dollars for past non-economic damages. She is not entitled to the proverbial second bite at the monetary apple for those claims.

COHEN, J., concurring specially.

I agree with the majority, albeit for different reasons, that a directed verdict was warranted on Davis' aggravation of a preexisting condition claim. But to clarify, the majority contends that Davis failed to present "any evidence" on that claim, while a review of the record demonstrates otherwise. The evidence at trial indicated that prior to the accident, Davis had received continued treatment for neck and back injuries, including 43 chiropractic visits over eight years; the accident impacted those same areas. There was also testimony that Davis' visits to the chiropractor for treatment on her neck and back increased dramatically in the week following the accident. However, such evidence, standing alone, was insufficient to allow the issue to reach the jury, as Davis failed to present specific medical testimony establishing a direct causal link between the accident and aggravation of her preexisting conditions. See Friedrich v. Fetterman & Assocs., P.A., 137 So. 3d 362, 365 (Fla. 2013) ("A defendant is entitled to a directed verdict when 'the plaintiff has failed to provide evidence that the negligent act more likely

than not caused the injury.'" (quoting Cox v. St. Joseph's Hosp., 71 So. 3d 795, 801 (Fla. 2011))).

However, I do not agree with the majority's application of the special damages pleading requirement, as it reflects a per se reversible error standard instead of focusing on whether the objecting party was prejudiced as a result of surprise. There was no surprise or resulting prejudice here, as noted by the trial court throughout the proceedings.[1] In addition to State Farm's extensive discovery regarding Davis' prior neck and back issues, State Farm's own motion in limine sought to exclude any reference to aggravation of preexisting conditions.[2] During voir dire, Davis explicitly questioned the jury on this issue. Moreover, State Farm never argued prejudice below, relying only on the fact that Davis had failed to plead the issue.

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[1] Indeed, the trial court denied Davis' motion to amend her complaint to conform with the evidence based specifically on lack of surprise to State Farm. It is noteworthy that, in a case on which the majority relies, the Third District stated that "a test of prejudice to the defendant is the primary consideration in determining whether a motion for leave to amend should be granted or denied." Carnival Cruise Lines, Inc. v. Nunez, 646 So. 2d 831, 834 (Fla. 3d DCA 1994) (emphasis added) (citation omitted).

[2] Despite an order requiring pretrial motions to be filed at least 45 days prior to the beginning of the trial period, State Farm waited until immediately before jury selection to raise this issue. The reversal in this case should not be construed as condoning such tactics.

In ruling that lack of surprise is irrelevant and a prejudice analysis unnecessary, the majority cites cases for the proposition that it is per se reversible error to permit evidence on special damages that were not pled. That approach ignores the rule's purpose: to avoid prejudice resulting from surprise. See Land Title of Cent. Fla., LLC v. Jimenez, 946 So. 2d 90, 93 (Fla. 5th DCA 2006) ("The purpose of the special damages rule is to prevent surprise at trial" (citing Fla. R. Civ. P. 1.120(g); also citing Bialkowicz v. Pan Am. Condo. No. 3, Inc., 215 So. 2d 767, 770 (Fla. 3d DCA 1968) (noting that "the very character [of special damages] requires that opposing counsel be apprised of their existence in order to be prepared at trial."))). Furthermore, the cases on which the majority relies for this proposition, Carnival and Land Title, are inapposite.

In Carnival, Nunez scraped his leg in the course of his duties as an employee and the scrape became an ulcer. 646 So. 2d at 832. Despite a preexisting condition of varicose veins, he did not plead aggravation of the condition and failed to mention it in his discovery responses or throughout the entirety of the first trial. Id. at 833. Instead, the issue was introduced for the first time during a pretrial hearing for the second trial, after which Carnival requested a continuance to prepare a defense against the new claim. Id. The

trial court denied the request, permitted Nunez to litigate the issue, and granted Nunez's motion to amend at the close of the evidence. Id.

The sole issue on appeal was whether the trial court abused its discretion by denying Carnival's motion to continue once the court had granted Nunez the opportunity to litigate the aggravation claim. Id. The Third District reversed because the unequivocal surprise thrust upon Carnival warranted a continuance so as to not prejudice Carnival's ability to prepare a defense. Id. at 834. The court specifically noted that all indications—including Nunez's silence on the issue during discovery—had "lulled Carnival into believing that Nunez's damages stemmed solely from the leg ulcer sustained in the accident." Id.

This focal point of Carnival's analysis—prejudice to the defendant—is absent here, as there was no "eleventh hour" notification of a different theory of recovery. Id. Unlike the plaintiff in Carnival, Davis made State Farm well aware of her preexisting conditions throughout discovery and trial. State Farm did not move for a continuance once the trial court denied its request to exclude any mention of aggravation, indicative of a lack of prejudice. Because prejudice is the driving force behind the special pleading requirement and is absent from this case, Carnival is inapplicable.

Land Title involved the negligent preparation of a deed: Land Title transferred a deed reflecting a description of the wrong property to Jiminez, the purchaser. 946 So. 2d at 92. During the ensuing suit, Land Title corrected the error, at which point Jiminez discovered that the property she had purchased was subject to a mineral rights reservation, allegedly decreasing its value. Id. The jury's damages award included special damages for the mineral rights reservation, although that had not been pled. Id. This Court found that special damages were not only unpled, but also not reasonably foreseeable:

> The fact that the title to the land that should have been described in the deed contained a mineral rights reservation that might necessitate a cure is not something that the law would reasonably expect to result from the negligence. That is, the damages do not follow by implication of law simply by proof of the wrong.

Id. at 94. This lack of foreseeability is the essence of surprise, which is what the pleading requirement was designed to prevent.[3] Id. at 93.

In contradiction of that general precept, this Court in Land Title then proceeded to suggest, "Lack of surprise will not authorize the admission of

[3] In the instant case, it would appear reasonably foreseeable in a personal injury claim that when an individual sustains injuries in the same areas for which she had sought eight years of treatment prior to an accident, the accident might have aggravated those preexisting conditions.

evidence of special damages that have not been specifically pleaded." Id. But this statement is both overbroad and, more importantly, dicta; it is not a concept subsequently cited with approval. It is neither binding nor applicable here. Therefore, I would reject a per se reversible error analysis and instead focus on whether the admission of evidence on special damages prejudiced the objecting party as a result of surprise.